SUPREME COURT, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., AND MRS. AREL KEYES,

APPELLANTS,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, AND GEORGE T. SMITH,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM OR DISMISS, WITH SUPPORTING BRIEF ON BEHALF OF APPELLEES

ARTHUR K. BOLTON
Attorney General

WILLIAM L. HARPER
Assistant Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PAUL L. HANES
Assistant Attorney General

Attorneys for Appellees

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., AND MRS. AREL KEYES,

APPELLANTS,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, AND GEORGE T. SMITH,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM OR DISMISS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court, and move the Court: (1) to affirm the judgment from which the appeal in the above-styled case was taken, on the ground that the questions are so unsubstantial as not to need further argument; or, in the alternative, (2) to dismiss

this appeal on the ground that the matters in controversy in this action and upon this appeal have become abstract and moot by virtue of a Special Election held on February 23, 1966, to fill the vacancy in the seat for the 136th Representative District of Georgia.

This, the ____ day of April, 1966.

ARTHUR K. BOLTON
Attorney General

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

WILLIAM L. HARPER
Assistant Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PAUL L. HANES
Assistant Attorney General

Attorneys for Appellees

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

BRIEF SUPPORTING MOTION TO AFFIRM OR DISMISS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT

On June 16, 1965, Mr. Julian Bond was duly elected as the Representative for the 136th House District of the Georgia House of Representatives. On Thursday, Jan-

uary 6, 1966, in Atlanta, Georgia, the Student Non-Violent Coordinating Committee, just prior to the scheduled convening of the Georgia General Assembly, issued a statement urging Americans to refuse to respond to the draft.[1] Immediately following the issuance of this statement, Mr. Bond, the Communications Director of the Student Non-Violent Coordinating Committee in Atlanta, was interviewed by all forms of news media. Mr. Bond stated that he admired the courage of those who burned their draft cards; that he encouraged people not to participate in the Viet Nam war for any reason they might choose; and that as a "second-class" citizen he felt no obligation to support the war in Viet Nam.[2] Mr. Bond also stated that he did not know whether or not he would be willing to commit treason in the event the United States was engaged in a declared war.[3]

On January 10, 1966, on the floor of the House of Representatives, Mr. Bond was asked to step aside and refrain from taking the oath of office, as challenges to his qualifications for office had been filed by members of the House. The petitions challenging his qualifications were referred to a special committee of the House, which conducted a hearing on them later that same day. The petitions alleged, among other things, that Mr. Bond was not qualified to take the oath, required by both the United States and Georgia Constitutions, to support and uphold the Constitution of the United States.[4]

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[1] The full text of the statement is attached hereto as Appendix A.

[2] Appellants' Jurisdictional Statement, Appendix B, p. 24.

[3] Stipulation of Fact, p. 3, Exhibit 3, First Part of Transcript.

[4] Art. VI, Cl. 3, United States Constitution; Art. III, Sec. VI, Para. I, Constitution of Georgia. (Ga. Code Ann. § 2-1801).

After a full hearing, at which Mr. Bond was represented by counsel, the special committee recommended that Mr. Bond not be seated, and this report was adopted by the House by a vote of 184 to 12.

A Complaint was then filed in the United States District Court for the Northern District of Georgia, by Mr. Bond and two persons residing in his District. The Complaint alleged that the action of the House was unconstitutional in that it deprived Mr. Bond of freedom of speech; procedural due process of law, trial by jury, and constituted a Bill of Attainder or ex post facto law. The Complaint also attacked the validity of certain state constitutional provisions. In addition, the Complaint alleged that the action of the House disenfranchised Mr. Bond's constituents.

After responsive pleadings were filed, along with a stipulation of facts, and after a hearing, the Court, Chief Judge Tuttle dissenting, denied the injunctive relief sought and dismissed the Complaint. *Bond, et al.* v *Floyd*, — F. Supp. —, 34 Law Week 2442 (D. C. Ga. 1966).

SUMMARY OF ARGUMENT

I.

The judgment of the court below should be affirmed for properly denying the relief sought by the Appellants.

A.

The questions presented in the Jurisdictional Statement of the Appellants are not the questions before the Court. Julian Bond was challenged as to his qualifications

for office in the State Legislature. The Georgia Constitution, like that of the United States, provides that each House of the Legislature is the judge of the qualifications of its members. Article IV, Section VII, Paragraph I, Constitution of Georgia. The Supreme Court of Georgia has held that the term "qualifications" is broader than those requirements set forth in the State Constitution. *Rainey* v. *Taylor*, 166 Ga. 476, 143 S. E. 383 (1926). Mr. Bond was challenged on his ability to take the oath required of state legislators by both the United States and Georgia Constitutions. He was not excluded from public office because of his public statements.

Mr. Bond was adjudicated to be unqualified for public office. The statements made or endorsed by him were evidence on the question of qualifications. The determination that Mr. Bond was unable to take the required oath does not constitute an unconstitutional infringement on freedom of speech. Any infringement was, in this instance, an indirect one. Placed in the balance with the State's rights to take measures for its self-preservation, it cannot be said that an unconstitutional infringement of free speech occurred here. A review of the cases also shows that the statements of Mr. Bond would constitute a clear and present danger to the State and the Nation, and that in a criminal prosecution he would find no protection in the First Amendment. Finally, it is clear that Mr. Bond's call to action was at odds with the premises of democratic government and with the manner in which political change is to be effected. *Garrison* v. *State of Louisiana*, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1965).

The Georgia Legislature had the power and duty to determine Mr. Bond's qualifications. The basis of the dis-

qualification was the oath to uphold and support the Constitution. The only remaining issue before the Court is whether or not substantive due process of law was afforded.

In order to give validity to the separation of powers concept on the state level, and to our system of federalism, some restraint should be exercised by courts considering state political questions concerning particular public offices. That restraint should be exercised by a court only requiring a national evidentiary basis for the constitutionally permissible action of the state legislature. That evidentiary basis is ample in the case at bar.

The exclusions from office in no way disenfranchised Mr. Bond's constituents. The events giving rise to his disqualification, occurred subsequent to his election. After his disqualification, his seat was declared vacant and a Special Election was held. The situation does not differ from a case in which a legislator becomes insane after election and prior to assuming his office. Ga. Code § 89-101(5).

House Resolution No. 19, declaring the result of the hearing, does not constitute a Bill of Attainder or ex post facto law. If the Legislature has the right to judge the qualifications of its members, then any declaration of that result could not be a Bill of Attainder or ex post facto law. With respect to qualifications, the House acts judicially and not legislatively. If a legislator is denied his seat on the basis of race, religion, or the manner in which he parts his hair, the action might be void for other constitutional infirmities, such as violation of the Equal Protection Clause. But the assertion of the Attainder Clause in this case reduces itself to absurdity.

Finally, the only relevant provisions of the Georgia Constitution at issue here are not unconstitutionally vague, as they are almost identical to a clause in the United States Constitution. The so-called "test oath for public office" referred to in Appellants' Jurisdictional Statement is contained in the Constitution of the United States.

B.

This Court should dismiss the appeal for another reason. The questions raised in the case are now moot, as a Special Election was held on February 23, 1966, to fill the seat for the 136th District. Mr. Bond entered this election, and won. New petitions contesting his qualifications for office were filed. New issues will no doubt be injected in the second contest which will be raised in another action. Therefore, the controversy represented by this appeal has become moot.

ARGUMENT

I.

A. The Judgment of the District Court Should Be Affirmed As the Questions Presented Do Not Warrant Further Consideration.

Julian Bond was not "tried" by the Georgia House of Representatives for the commission of a crime. Neither was he punished for expressing unpopular opinions. He was found to lack the necessary qualifications for the office of State legislator.

Every state legislature possesses the authority to determine the qualifications of its members. 49 *Am. Jur.*, "States, Territories, and Dependencies", § 34, p. 251. Congress has this power, and the General Assembly of Georgia also possesses this necessary authority. Article I, Section V, Clause I, United States Constitution; Article III, Section VII, Paragraph I, Constitution of Georgia (Ga. Code Ann: § 2-1901). Regardless of whether or not the word "qualifications" is restricted to those things enumerated in the Constitution, such as age or residence, the disqualification of Bond was permissible. The Constitution of the United States requires that every state legislator take an oath to uphold and support the Constitution of the United States. Article VI, Clause 3, United States Constitution. This necessarily includes support of valid statutes enacted pursuant to that Constitution, such as the Selective Service Act, *Gara v. United States*, 178 F. 2d 38 (6th Cir. 1949). The Constitution of Georgia requires an oath that a legislator support the state and Federal Constitutions.[5] Bond's public statements merely constituted evidence of his ability, or lack of it, to take these oaths. The duty of determining whether or not an individual is qualified to take this oath rests upon the legislative body, and not upon the individual.

The refusal to seat Bond did not constitute an unconstitutional impairment of his First Amendment right of free speech. This Court has never questioned the power of a state to safeguard public service from disloyal conduct. *Baggett* v. *Bullitt*, 377 U. S. 360, 379, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Gerende* v. *Board of Supervisors*,

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[5] Art. III, Sec. VI, Para. I, Constitution of Georgia. (Ga. Code Ann. § 2-1801).

34 U. S. 56, 71 S. Ct. 565, 95 L. Ed. 745 (1951). This right is even less questionable when based upon the oath required of state legislators appearing in Article VI, Clause 3 of the United States Constitution. *American Communications Association* v. *Douds*, 339 U. S. 382, 415, 70 S. Ct. 674, 94 L. Ed. 925 (1950). It seems obvious that any infringement of First Amendment rights in this case was an indirect one, justified by the public interest in the particular circumstances. *Barenblatt* v. *United States*, 360 U. S. 109, 126, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959).

The facts in this case also show that the State's action can be upheld on the basis of the "clear and present danger" test, although it is not necessary to do so. The statements either made or endorsed by Mr. Bond are more extreme than those involved in the Espionage Act cases. *Schenck* v. *United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); *Frohwerk* v. *United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919); *Debs* v. *United States*, 249 U. S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919). While Georgia of course does not maintain that its refusal to seat Bond was done in furtherance of the Espionage Act of 1917,[6] it would seem that the State's action, pursuant to another constitutional requirement, could not be invalid if Mr. Bond's statements were not protected under the "clear and present danger" doctrine.

The First Amendment does not allow a citizen to urge others to violate the law. A commitment to uninhibited, robust debate on public issues is indeed the arch supporting our democratic system of government; but the orderly and legal manner in which political or social changes are to be achieved is the keystone of that arch. Mr. Bond's

[6] 40 Stat. 217, 219.

statements encouraged others to violate the Selective Service Act for any reasons. This speech is not protected. *Garrison* v. *State of Louisiana*, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1965).

Having placed the First Amendment in its proper perspective, the duty then evolved upon the court below to determine if substantive due process of law had been afforded to Bond. The essence of substantive due process is the prohibition of arbitrary action by the State. This issue was resolved below in the favor of the State.

In order to make the requisite determination, it is necessary for the federal courts to choose a standard of review. The District Court properly concluded that the inquiry must be made in the context of two principles; a respect for separation of powers on the State level, and the place of state government under our federal system.[7] The courts on a given level of government have consistently refused to review the action of the legislative branch in judging qualifications. *Re. Chapman*, 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154 (1897); Story, *Comm. on the Constitution*, Vol. II, § 831, p. 294. Although under certain circumstances a federal court could and should review such action by a state legislature, it is equally clear that some control of internal affairs is left to state legislatures. *Snowden* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). In order to give credence to these principles, the District Court reviewed the facts to determine whether or not there was a rational evidentiary basis for the ruling of the Georgia House of Representatives. *Garner* v. *Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961); *Thompson* v. *Louisville*, 362 U. S. 199, 80

[7] Appellants' Jurisdictional Statement, Appendix B, pp. 34, 35.

S. Ct. 624, 4 L. Ed. 2d 654 (1960). The District Court found that the statements of Bond constituted a rational basis for concluding that he was not qualified to take the required oath. This Court should affirm that decision.

The other questions presented in the Jurisdictional Statement are also meritorious. Appellants contend that the action of the Georgia House disenfranchised Mr. Bond's constituents in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also constituted a Bill of Attainder or ex post facto law. These positions are contradictory and somewhat confusing. Both freedom of speech and equal protection apply to state action. If Georgia's action did indeed violate Bond's First Amendment rights, then action should fall on that ground, and not on equal protection. On the other hand, if the House had the power to determine Mr. Bond's qualifications, and did so in a proper manner, Mr. Bond's constituents were deprived of no legally protectable interest. As soon as the vacancy was declared, a Special Election was called and held to fill the seat for the 136th Representative District. A temporary deprivation of representation does not violate equal protection of the laws. See *Barry* v. *United States*, 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867 (1929).

The argument pitched on Bill of Attainder or ex post facto is also frivolous and unfounded. Ordinarily, a legislature is precluded from disqualifying persons or ascertainable groups from office, but this prohibition does not apply to the judging of the qualifications of its members. In judging qualifications, both Congress and a state legislature sit in a judicial capacity. *Barry* v. *U. S.*, *supra*, at p. 613. This situation, like impeachment of the executive, vests the legislative branch with judicial powers. The ex-

ercise of that power cannot result in a prohibited Bill of Attainder or ex post facto law. The result may be invalid for some other reason, such as failure to accord due process, but it can never be attainder, as the procedure itself is constitutionally authorized.

Finally, the Appellants' claim that certain Georgia constitutional and statutory provisions are void for vagueness under the Fourteenth Amendment. Although it is clear that the decision below did not rest on those provisions, it is equally clear that those provisions are not vague, being substantially identical to provisions in the United States Constitution. In any event, the meaning of the term "qualifications" is irrelevant here, as the action of the House was based upon, among other things, an oath in the United States Constitution.

This Court should affirm the decision of the court below, as the questions actually raised in that case do not warrant further consideration.

B. In the Alternative, This Court Should Dismiss the Appeal As the Controversy Has Become Moot.

The action of the House denying a seat to Mr. Bond was taken on January 10, 1966. A vacancy was thereupon declared in the seat for this District, and a Special Election was called pursuant to State law.[8]

At this Election, held on February 23, 1966, Mr. Bond re-offered and was the successful candidate. He has been so certified by the Secretary of State. New petitions chal-

[8] Ga. Code Section 34-805.

lenging his qualifications have been filed, and they are now pending before the House Rules Committee for a hearing. The General Assembly has already adjourned for this year, and any special sessions this year are highly unlikely. The Complaint did not seek to recover the compensation to which Bond would have been entitled had his ouster been held erroneous, and legislators draw compensation only while the General Assembly is in session, except with respect to interim committee service.

If the pending hearings result in the seating of Mr. Bond, he will take office by virtue of his election in the February Special Election, and the question as to the validity of the previous refusal of the House to seat him will be moot. If the pending hearings result in his being again refused a seat, new and additional issues likely will be injected, which will undoubtedly be asserted in this or another action. These facts, which this Court may determine by extrinsic evidence, *Mills* v. *Green*, 159 U. S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895), render the controversy moot. *Heitmuller* v. *Stokes*, 256 U. S. 359, 41 S. Ct. 522, 65 L. Ed. 990 (1921); *Brownlow* v. *Schwartz*, 261 U. S. 216, 43 S. Ct. 263, 67 L. Ed. 620 (1923). The fact that the constitutionality of a statute was attacked below and remains for decision is immaterial. *Oil, Chemical & Atomic Workers' Union* v. *Missouri*, 361 U. S. 363, 368, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960). This Court should not decide abstract propositions. *Mills* v. *Green*, *supra*. The fact that new proceedings below are likely in which some of the same issues will be raised again does not alter the rule, as the issues can be decided on a subsequent appeal. *St. Pierre* v. *United States*, 319 U. S. 41, 43, 63, S. Ct. 910, 87 L. Ed. 1199 (1943). Even where the case will not be moot in the event certain developments

subsequently transpire below, this Court will not decide the case but will remand for further consideration by the District Court. *Fortson* v. *Toombs*, 379 U. S. 621, 85 S. Ct. 598, 13 L. Ed. 2d 527 (1965).

CONCLUSION

The judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed, should be affirmed on the ground that the questions upon which the decision below depended were fully explored, correctly answered, and do not warrant or justify further argument. In the alternative, the appeal should be dismissed for mootness.

Respectfully submitted,

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

ARTHUR K. BOLTON
Attorney General

WILLIAM L. HARPER
Assistant Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PAUL L. HANES
Assistant Attorney General

Attorneys for Appellees

APPENDIX A

The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

We believe the United States government has been deceptive in its claim of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each

case, the United States government bears a great part of the responsibility for these deaths.

Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry to "preserve freedom in the world" is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the "freedom" we find so false in this country.

We recoil with horror at the inconsistency of a supposedly "free" society where responsibility to lend oneself to military aggression. We take note of the fact that 60 per cent of the draftees from this country are Negroes

called on to stifle the liberation of Viet Nam, to preserve a "democracy" which does not exist for them at home.

We ask, where is the draft for the freedom fight in the United States?

We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives — as painfully as in Viet Nam.

CERTIFICATE OF SERVICE

I, ALFRED L. EVANS, JR., one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1966, I served a copy of the foregoing Motion to Affirm or Dismiss on the Appellants by mailing a copy in a duly addressed envelope with postage prepaid to his Counsel of Record, Howard Moore, Jr., Esq., 859½ Hunter Street, N. W., Atlanta, Georgia 30314.

ALFRED L. EVANS, JR.
Of Counsel for Appellees